

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-310

JAMIE LEE LOVERN

vs.

JAMIE JAY LOVERN.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff mother appeals from a judgment of divorce nisi that, in pertinent part, granted her joint legal custody with the defendant father of their minor daughter, and also appeals from two contempt judgments that were based on her failure to comply with visitation orders. We affirm.

Background. The parties were married in November of 2010, and had one child together. On or around June 1, 2015, the mother vacated the marital home and began residing with the child at the child's grandmother's house. On June 5, 2015, the mother filed a complaint for divorce in the Probate and Family Court, citing an irretrievable breakdown of the marriage, and moved for physical custody of the child and supervised visits by the father. The father answered and counterclaimed on the same ground, and requested joint legal and physical custody of the

child. On July 27, 2015, a motion judge entered a temporary order granting the parties joint legal custody of the child and physical custody to the mother, with supervised parenting time by the father. The motion judge also granted the mother's request for the appointment of a guardian ad litem (GAL) to investigate the issues of the "mental health of the parents"; the "parenting plan/supervised parenting time"; and the "allegations of sexual abuse of other children [by the father, and the] potential impact in [the parties'] child's relationship with Father," and to "make such recommendations as deemed appropriate and in the best interests of the child."

On February 16, 2016, the father filed a complaint for contempt, alleging that the mother failed to comply with the temporary order granting him parenting time. The parties agreed that the complaint for contempt be consolidated for trial with the complaint for divorce.

The parties and their counsel appeared for trial on April 7 and April 8, 2016. The trial judge heard testimony from both parties and rebuttal testimony from an ex-wife of the father; twenty-nine uncontested exhibits were entered in evidence, and the GAL report was admitted over the father's objection. At the start of the trial, the mother sought to amend her complaint to

seek sole legal custody, which the trial judge initially rejected as untimely, but then allowed.¹

Judgment of divorce nisi and on the contempt complaint entered on May 5, 2016, and findings of fact and rulings of law followed. The divorce judgment provided that the parties would have joint legal custody of the child and that the mother would have primary physical custody with unsupervised parenting time for the father. The trial judge found, in relevant part, that while the father had serious mental health problems in the past, he "has a consistent history of more than a year of stability and has been committed to his mental health treatment." The trial judge found that the father's mental health did not affect his ability to care for the child, and he "is capable of caring for the child and providing for her emotional and physical wellbeing." The trial judge also found that the mother, in seeking to severely limit the father's parenting time, was seeking to "strip [the father] of any meaningful relationship with the child" and to "marginalize the [father's] role in the child's life." The trial judge concluded that "it is in the child's best interests to have a substantial relationship with both of her parents. Based upon the credible evidence at trial, the [father] is in a position to co-parent the child." The

¹ The judge stated, "[W]e're here for trial today so I'm not entertaining any motions today," but noted "allowed" on the motion form.

trial judge also found the mother in contempt for failing to provide the father with parenting time as required by the temporary order.

On May 19, 2016, the father filed a second complaint of contempt, alleging that the mother denied him parenting time as required by the divorce judgment. On August 8, 2016, judgment entered that the mother was in contempt for failing to allow the father the mandated parenting time.

Joint legal custody. The mother argues that the trial judge made errors of fact and abused his discretion in ordering joint legal custody of the child. "The determination of custody rests within the discretion of the judge." Kendall v. Kendall, 426 Mass. 238, 251 (1997), cert. denied, 524 U.S. 953 (1998). However, an order of shared legal custody must be supported by written findings, Freedman v. Freedman, 49 Mass. App. Ct. 519, 521 (2000), and "the absence of evidence in support of findings, or the failure of the findings to support the judge's orders will constitute 'an abuse of discretion' and require reversal" (citation omitted). Prenaveau v. Prenaveau, 81 Mass. App. Ct. 479, 486 (2012). Furthermore, the "overriding concern of the court must be the promotion of the best interests of the child[] and [her] general welfare." Rolde v. Rolde, 12 Mass. App. Ct. 398, 402 (1981).

The mother contends that joint legal custody is inappropriate because the father's mental health adversely affects his ability to act in the child's best interests, the mother's mental health does not affect her ability to act in the child's best interests, and the trial judge was wrong to find otherwise. We do not disturb the joint legal custody order for two reasons.

First, the trial judge was not plainly wrong in finding that the father's mental health does not affect his ability to act in the child's "best interests." Hunter v. Rose, 463 Mass. 488, 494 (2012), quoting Custody of Kali, 439 Mass. 834, 845 (2003). Though the GAL expressed concerns regarding the father's mental health, a judge is not required to follow the recommendations of a GAL. Mason v. Coleman, 447 Mass. 177, 186 (2006). Moreover, the trial judge gave good reasons for his conclusion, noting that the father was actively engaged in therapy, had "successfully implemented a plan to assist him in maintaining his stability," and was current with his medications. As for the mother, the trial judge found that she was "not currently engaged in mental health treatment," and that her admitted issues with "high anxiety and trust due to her past have materially impacted her ability to co-parent the child." In particular, the trial judge found that the mother was actively attempting to sabotage the child's relationship with

the father against the child's best interests. We defer to the trial judge's credibility determinations, see Johnston v. Johnston, 38 Mass. App. Ct. 531, 536 (1995), and his findings are supported by the parties' testimony and the record.

Second, the mother does not address how the father's mental health, even as she views it, relates to the crux of shared legal custody: the parties' "mutual responsibility and involvement . . . in major decisions regarding the child's welfare including matters of education, medical care and emotional, moral and religious development." G. L. c. 208, § 31. The mother does not allege that the parties lack "a common desire to promote the child['s] best interests," or will not "be able mutually to agree on the basic issues in child rearing and want to cooperate in making decisions for [the child]" (citation and quotation omitted). Rolde, 12 Mass. App. Ct. at 404. Indeed, the mother's position until the start of trial was that she had no problem with joint legal custody with the father.

We note that the trial judge did not make findings on the parties' future ability to cooperate.² However, "[t]he judge heard considerable testimony over the course of [the] trial and

² The GAL was not ordered to report to the trial judge on the issue of custody, and his report did not directly address the parties' ability to communicate and to make joint decisions in the interest of the child. Nor did the parties' counsel elicit testimony on this point.

apparently did not consider the parties unable to cooperate on . . . child care issues" other than the terms of the father's parenting time. Kendall, 426 Mass. at 251 n.21. In addition, the trial judge made a number of findings reflecting the parties' past ability to "communicate productively . . . and jointly work together in making major decisions concerning [the child's] well being." Cf. Custody of Kali, 439 Mass. at 837 n.5, citing Rolde, 12 Mass. App. Ct. at 404-405. Both parties testified that, prior to their separation, they had shared caregiving responsibilities not only for their own child, but also during the visits of children from the father's previous marriages. Because the record does not reveal a conflict other than the parties' inability to reconcile their views as to the father's parenting time, the mother has not established that the trial judge abused his discretion in granting joint legal custody. See Kendall, supra at 251.³

Civil contempt. The mother also challenges the two contempt judgments. "[A] civil contempt finding [must] be supported by clear and convincing evidence of disobedience of a clear and unequivocal command." Birchall, petitioner, 454 Mass.

³ The mother accurately notes that the judge's findings as to the parties' mental health rely almost entirely verbatim on the father's proposed findings. Although such a practice has been criticized, we will not reject findings that are supported by the evidence. See Commonwealth v. DeMinico, 408 Mass. 230, 238 (1990); Cormier v. Carty, 381 Mass. 234, 236-237 (1980). Here, the evidence supports the trial judge's material findings.

837, 853 (2009). We review the ultimate finding of contempt for abuse of discretion. Judge Rotenberg Educ. Ctr., Inc. v. Commissioner of the Dep't of Mental Retardation (No. 1), 424 Mass. 430, 443 (1997).⁴

The father's first complaint for contempt, filed on February 16, 2016, alleged the mother's failure to comply with the temporary order by not allowing him supervised visits on two Tuesdays and one Thursday earlier that month.⁵ The disruption occurred due to the mother's changed work schedule, which the parties had attempted to accommodate. However, while the father's aunt was available to supervise on Tuesdays and Thursdays, the mother added the condition that the father not change the child's diapers. The father would not agree to that condition, so the mother refused to allow the weekday visits. The mother argues on appeal that she did not violate the court order because "supervise" is an ambiguous term, and a reasonable

⁴ An abuse of discretion occurs where "the judge made a clear error of judgment in weighing the factors relevant to the decision such that the decision falls outside the range of reasonable alternatives" (citation and quotation omitted). L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

⁵ The temporary order stated, in relevant part: "2. Father shall have supervised parenting time on Tuesdays + Thursdays from 2-4 PM + Sundays 4-6 PM; + any other times that the parties agree. 3. Parenting time to be supervised by mother or maternal grandmother. 4. Father may seek further hearing on parenting time once the GAL is able to investigate + report."

interpretation of the term allowed her to impose the diapering prohibition.⁶

"A term is ambiguous only if it is susceptible of more than one meaning and reasonably intelligent persons would differ as to which meaning is the proper one." Bercume v. Bercume, 428 Mass. 635, 641 (1999), quoting Citation Ins. Co. v. Gomez, 426 Mass. 379, 381 (1998). Here, no reasonable interpretation of "supervised" in the context of parental visitation includes the ability to prohibit the fundamental parenting function of changing a diaper. See Demoulas v. Demoulas Super Mkts., Inc., 424 Mass. 501, 567 (1997), and cases cited (contempt appropriate where plain meaning of terms puts defendant on notice, despite dispute). The mother points to no other terms in the temporary order -- and there are none -- that would allow her to forbid the father from diapering the child as a condition for visitation. The mother's proper course of action would have been to request a clarification or a modification of the order. See Barnes v. Devlin, 84 Mass. App. Ct. 159, 164-165 (2013). Instead, she took matters into her own hands, in violation of the order. The first contempt finding was proper.

⁶ The mother's additional contention, that the first contempt judgment is based on her videotaping of the father, is without merit. The judgment clearly states that the mother's contempt was for her failure to provide the father with parenting time.

The mother was again found in contempt in a judgment that entered on August 8, 2016, following the father's May 19, 2016, complaint that she failed to allow him parenting time per the divorce judgment. The mother argues on appeal that the second judgment of contempt should be reversed and remanded for an evidentiary hearing, which she requested, on whether her failure to allow the father parenting time was a clear and willful disobedience of the order, and whether the father posed a threat to the child.

"[A] judge may properly rule on a complaint for contempt without an evidentiary hearing, or without receiving live testimony . . . [when] material facts are not in dispute." Mahoney v. Mahoney, 65 Mass. App. Ct. 537, 540 (2006). The mother did not dispute below, nor does she now, that the provisions for parenting time are clear and unequivocal, and that she prevented the visits. See Birchall, petitioner, 454 Mass. at 853. Rather, she contested the wisdom of the order.

"Even if erroneous, a court order must be obeyed, and until it is reversed by orderly review, it is to be respected. United States v. United Mine Wkrs. of America, 330 U.S. 258, 294 (1947). '[O]nly where the court lacks jurisdiction to make an order or where an order is transparently invalid on its face may a party ignore a court order and attempt to evade sanctions by litigating the validity of the underlying order.' Oakham Sand & Gravel Corp. v. Oakham, 54 Mass. App. Ct. 80, 87 (2002), and cases cited."

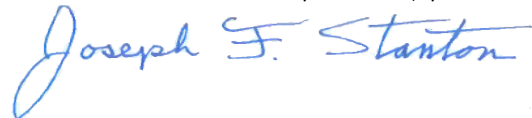
Mohamad v. Kavlakian, 69 Mass. App. Ct. 261, 264 (2007). The mother could have addressed the suitability of the visitation through a request for modification -- but not through self-help. The finding of contempt was not in error.

Judgment of divorce nisi
affirmed.

Contempt judgment entered May
5, 2016, affirmed.

Contempt judgment entered
August 8, 2016, affirmed.

By the Court (Wolohojian,
Kinder & Hand, JJ.⁷),



Clerk

Entered: August 2, 2019.

⁷ The panelists are listed in order of seniority.